BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition for Rulemaking of ACA)	
International)	
)	

COMMENTS OF PROFESSIONAL ASSOCIATION FOR CUSTOMER ENGAGEMENT

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The Professional Association for Customer Engagement ("PACE") submits these comments in response to the public notice issued by the Commission on February 21, 2014 pertaining to ACA International's Petition for Rulemaking ("ACA Petition").

I. INTRODUCTION AND SUMMARY

Through its Petition, ACA International ("ACA") requests the Commission to: (1) clarify that not all predictive dialers are categorically autodialers; (2) define "capacity" under the TCPA to mean present ability; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe harbor for autodialed "wrong number" non-telemarketing calls to wireless numbers.²

As thoroughly documented in the petitions and comments filed in this docket, the current landscape of class action TCPA litigation exposes legitimate businesses to unnecessary litigation costs and forces such businesses to choose between entering into settlements that primarily benefit plaintiffs' counsel or risk potentially ruinous damages due to nonsensical TCPA

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¹ See Public Notice, Consumer & Government Affairs Bureau Reference Information Center Petition for Rulemaking Filed, RM No. 11712 (rel. Feb. 21, 2014), available at http://transition.fcc.gov/Daily Releases/Daily Business/2014/db0221/DOC-325716A1.pdf.

² ACA Petition at 18, CG Docket No. 02-278 (filed Jan. 31, 2014).

interpretations relied upon by opportunistic plaintiffs' counsel.³ The relief sought by ACA would go a long way toward restoring a measure of common sense to TCPA litigation and achieve Congress' stated goal of balancing consumers' privacy interests with legitimate business practices.⁴ To that end, PACE supports the Petition.

PACE believes, however, that the Commission should utilize its authority under 47 C.F.R. § 1.2 to provide broader clarification with respect to "wrong number" calls. Specifically, the Commission should provide relief that encompasses all calls that would be exempt from TCPA liability but for the fact that the telephone number has been reassigned *without the caller's knowledge*. Similarly, the Commission should clarify that calls made to a wrong number pursuant to a *good faith* error (e.g. when a consumer provides an incorrect telephone number or an employee incorrectly records the consumer's telephone number) do not violate the TCPA. In addition to providing clarification on wrong number calls, the Commission should clarify that the TCPA's consent requirements for autodialed and/or prerecorded calls made to numbers for which the called party is charged do not apply if the caller has no way of knowing the called party would be charged for the call. Finally, the Commission has the authority to provide the requested relief in the form of a declaratory ruling and PACE believes that is the preferable procedural method to address these issues.

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³ See, e.g. ACA Petition at i, 7; Communication Innovators Petition for Declaratory Ruling ("CI Petition") at 14-15, GC Docket No. 02-278 (filed Jun. 7, 2012); Time Warner Cable Comments ("TWC Comments") at 2-3, GC Docket No. 02-278 (filed Mar. 10, 2014); PACE Reply Comment, GC Docket No. 02-278 at 3 (filed Jan 6, 2014).

⁴ See 102 P.L. 243, 2 ("Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.").

⁵ See 47 C.F.R. 1.2(a) (providing that the Commission may issue a declaratory ruling upon its own motion).

II. THE COMMISSION SHOULD CLARIFY THAT A PREDICTIVE DIALER IS AN ATDS ONLY IF IT MEETS THE STATUTORY ELEMENTS

PACE concurs with the position taken by ACA and other petitioners that the Commission's 2003 Report and Order and 2008 Declaratory Ruling must be read in conjunction with the statutory definition of ATDS; thus, the Commission merely held that a system that meets the statutory elements of an ATDS is not exempt from the TCPA's autodialing restrictions simply because the dialer is paired with predictive dialing software. Put another way, just because a predictive dialer *can* be an ATDS does not mean that every predictive dialer *must* be an ATDS. The dialer must still meet the statutory definition of an ATDS. Furthermore, PACE agrees that clarification of this issue is necessary to thwart ongoing litigation costs and damages incurred by businesses because plaintiffs' attorneys, and even some courts, have misinterpreted the Commission's rulings as modifying the statutory definition of ATDS⁷—something the Commission does not even have the authority to do.

III. THE COMMISSION SHOULD CLARIFY THAT CAPACITY MEANS PRESENT ABILITY

As previously outlined by PACE, the term "capacity," as used in the definition of ATDS, necessarily refers to a system's *present* ability (i.e. what it is capable of doing, without further modification, *at the time the call is placed*). This interpretation is supported by the plain

⁶ See ACA Petition at 6-8; see also Communication Innovators Notice of Ex Parte Presentation, GC Docket No. 02-278 (filed Mar. 4, 2014).

⁷ See, e.g., Griffith v. Consumer Portfolio Serv., 838 F. Supp. 2d 723, 726-727 (N.D. Ill. 2011), Echevvaria v. Diversified Consultants, Inc., 2014 U.S. Dist. LEXIS 32136, 19-20 (S.D.N.Y. Feb. 28, 2014).

⁸See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-843 (U.S. 1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

⁹ PACE Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking ("PACE Petition") at 10-12, GC Docket No. 02-278 (filed Oct. 18, 2013).

language of the statute (which uses the present tense—"has the capacity"), 10 comports with the everyday meaning of the term "capacity," 11 aligns with recent court opinions 12 and represents sound public policy and basic common sense. 13 PACE concurs with ACA's position that, despite the favorable ruling issued in *Hunt* and subsequently in *Gragg*, industry needs clarification from the Commission on this issue to combat nuisance lawsuits. Notably, these decisions are not binding on other district courts, whereas a declaratory ruling issued by the Commission binds such courts pursuant to the Hobbs Act. 14 Moreover, clarification by the Commission would alleviate uncertainty related to the term "capacity" caused by *dicta* issued by other courts and set forth a uniform standard businesses can rely upon in all jurisdictions. 15

IV. THE COMMISSION SHOULD CLARIFY THAT CERTAIN "WRONG NUMBER" CALLS DO NOT VIOLATE THE TCPA

PACE supports ACA's request, and a similar request made by United Healthcare Services, Inc. (United Healthcare), ¹⁶ to insulate businesses from damages stemming from "wrong number" calls made in good faith by the caller. Additionally, it concurs with DIRECTV, LLC (DIRECTV) that this should encompass not only situations where a number is reassigned to a

¹⁰ See 47 U.S.C. § 227(a)(1).

¹¹ See PACE Petition at 10-11 (discussing dictionary definitions of "capacity").

¹² See e.g., Hunt v. 21st Mortg. Corp., 2013 U.S. Dist. LEXIS 132574 at 11 (N.D. Ala. Sept. 17, 2013), Gragg v. Orange Cab Co., 2014 U.S. Dist. LEXIS 16648 at 8-9 (W.D. Wash. Feb. 7, 2014).

¹³ See Id.; see also PACE Petition at 11 (demonstrating that a contrary interpretation would sweep virtually all computers and smart phones within the definition of ATDS).

¹⁴ See. e.g., FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (U.S. 1984) (citing 28 U.S.C. § 2342(1), 47 U.S.C. § 402(a)); see also Pac. Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1125 (9th Cir. Cal. 2003) ("[t]he Hobbs Act gives the courts of appeals exclusive jurisdiction to 'determine the validity of' all FCC final orders.").

¹⁵ See. e.g., Griffith, 838 F. Supp. 2d at 727 ("[Defendants] do not explain why they believe that the Castel dialer cannot be 'told' — i.e., programed — to dial numbers randomly or sequentially. They simply conclude without any explanation or analysis that it cannot perform these functions.").

¹⁶ United Healthcare Petition for Expedited Declaratory Ruling ("United Healthcare Petition"), GC Docket No. 02-278 (filed Jan. 16, 2014).

new subscriber, but also scenarios where a customer provides an incorrect number and/or the caller incorrectly records the customer's number. 17

A. Reassigned Numbers

It is estimated that as many as 37 million telephone numbers are recycled each year.

Based on PACE members' experiences, consumers typically do not inform businesses with which they conduct business that they have changed their phone numbers. Furthermore, as outlined in United Health's petition and the comments filed in response to the same, there is no definitive source for businesses to use to determine whether a number has been reassigned to a new subscriber.

A common misconception is that Neustar provides a comprehensive wireless number database, which can be used to determine the current subscriber of a wireless telephone number.

While the Neustar list might be helpful, it is not a comprehensive source of all mobile telephone numbers. Neustar's website indicates that its Enhanced Wireless File includes "approximately 100 million self-reported mobile phone numbers, names and addresses."

By contrast, it is estimated that, as of 2011, there were over 327 million mobile phones in the United States.

The Federal Trade Commission (FTC) has even acknowledged the unavailability of reliable data pertaining to reassigned wireless numbers, which is why the National Do Not Call

¹⁷ DIRECTV's Comments in Support of United Healthcare Petition ("DIRECTV Comments") at 16-18, GC Docket No. 02-278 (filed Mar. 10, 2014).

¹⁸ United Healthcare Petition at 5 (citing Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL STREET JOURNAL (Dec. 1, 2011).

¹⁹ *Id.*; *see also* Comcast Comments, or, in the Alternative, Petition for Declaratory Ruling ("Comcast Comments"), GC Docket No. 02-278 (filed Mar. 10, 2014).

²⁰ See, e.g., Gerald Roylance's Comments re United Healthcare Service's Petition at 2, GC Docket No. 02-278 (filed Mar. 10, 2014).

²¹ See Neustar Resources and Tools, available at http://www.neustar.biz/resources/product-literature/enhanced-wireless-file.

²² Cecilia Kang, *Number of Cell Phones Exceeds U.S. Population: CTIA Trade Group*, Washington Post (Oct. 11, 2011), *available at* http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html.

(DNC) Registry hygiene process does not include the removal of wireless telephone numbers.²³ It is impossible for a business to know for sure whether the person it is trying to contact still uses that telephone number. PACE concurs with ACA and others who analogize this problem with the compliance issue created when a telephone number is ported from a wireline service to a wireless service.²⁴ The Commission acknowledged this problem and provided a safe harbor for calls made to numbers recently ported from a wireline service to a wireless service because, absent such relief, the TCPA would "demand the impossible" from callers.²⁵ Given the impossibility of accurately determining whether a number has been reassigned, the Commission should provide similar relief to ensure businesses are not held liable for calls made with the good faith belief that the number is still assigned to the subscriber whom the businesses is permitted to call.

The compliance impossibility created when a number is reassigned to a new subscriber is not, however, limited to autodialed non-telemarketing calls to wireless numbers. The underlying issue identified by ACA and United Health— the patent unfairness of liability stemming from businesses' inability to determine whether a number has been reassigned to a new subscriber—applies equally to all calls that would be exempt from TCPA liability but for the reassignment of a telephone number without the caller's knowledge. As such, there is no reason to distinguish between telemarketing and non-telemarketing calls or between the TCPA's autodialer restrictions and its DNC restrictions.

²³ Federal Trade Commission, *Do-Not-Call Improvement Act of 2007 Report to Congress Regarding the Accuracy of the Do Not Call Registry* (Oct. 2008), *available at* http://www.ftc.gov/sites/default/files/documents/reports/do-not-call-improvement-act-2007-report-congress-regarding-accuracy-do-not-call-registry/p034305dncreport.pdf.

²⁴ See ACA Petition at 15-16; see also TWC Comments at 5-6.

²⁵ *Id.* (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 at ¶¶ 1, 9 (2004)).

Congress and/or the Commission previously determined that, as a matter of law, certain types of calls are exempt from TCPA liability, including: (1) autodialed and/or prerecorded calls made to a wireless telephone number with the called party's prior express consent (prior express written consent for telemarketing calls); (2) prerecorded telemarketing calls made to a residential number with the called party's prior express written consent; and (3) telemarketing calls made to a consumer whose number is on the National DNC Registry pursuant to an established business relationship (EBR) and/or the consumer's prior consent. ²⁶ Plaintiffs' attorneys and some courts, however, have taken the position that the legality of such calls hinges on whether the telephone number is still assigned to the subscriber who consented to receive calls or with whom the business has the EBR. ²⁷ PACE, therefore, requests the Commission to clarify that calls made to a number that, *unbeknownst to the caller*, has been reassigned to another subscriber do not violate the TCPA in the following situations:

- 1) autodialed and/or prerecorded non-telemarketing calls made to a wireless telephone number pursuant to a previous subscriber's prior express consent;
- 2) autodialed and/or prerecorded telemarketing calls made to a wireless telephone number pursuant to a previous subscriber's prior express written consent;
- 3) prerecorded telemarketing calls made to a residential telephone number pursuant to a previous subscriber's prior express written consent; and
- 4) telemarketing calls made to a wireless or residential telephone number that is on the National DNC Registry pursuant to a previous subscriber's prior consent and/or an EBR between a previous subscriber and the seller on whose behalf the call is made.

The Commission should also provide the seller a reasonable time period after discovering that the number has been reassigned to remove it from all calling lists.²⁸

²⁶ See 47 U.S.C. §§ 227(b)(1)(A)-(B); see also 47 C.F.R. §§ 64.1200(a)(1)-(3), (c)(2), (f)(14).

²⁷ See, e.g., Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 641 (7th Cir. Ill. 2012).

²⁸ Other provisions in the Commission's regulations provide similar grace periods to allow businesses the opportunity to remove numbers from calling lists. *See, e.g.,* 47 C.F.R. § 64.1200(d)(3) (providing that telemarketers must honor a company specific DNC request within a "reasonable time from the date such request is made," which may not exceed 30 days).

B. Incorrect Numbers

Another common factual scenario that creates compliance impossibilities for sellers occurs when a consumer inadvertently provides a wrong telephone number to a seller. For example, the customer may transpose digits or accidentally press the wrong computer button when completing an application, registration form, quote request, consent form or other documentation that is provided to the caller. Worse yet, a person might purposely provide incorrect information (e.g. via an online consent form) for the specific purpose of exposing the business to TCPA liability. In such situations, the business has a good faith basis to believe it has an EBR, prior express consent and/or prior express written consent, depending on the specific context, which allows it to lawfully call the consumer. Yet, the business is subjected to potential TCPA liability if the number turns out to be incorrect.²⁹ Similarly, an inadvertent mistake made by an employee when recording a customer's phone number (e.g. during a telephone call, at the point of sale, etc.) could result in substantial liability for a business that calls the consumer under the *good faith* belief that such calls are exempt from the TCPA. The concept of a good faith error defense has been recognized by some courts;³⁰ however, clarification by the Commission is needed to establish a uniform standard and provide legitimate businesses with much needed protection against nuisance TCPA lawsuits. PACE believes the requested clarification can, and should, be crafted narrowly such that it does not provide bad actors with a loophole to escape

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²⁹ See e.g. Soppet, 679 F.3d at 641 ("It is hard to see why Customer's error should be treated differently from the reassignment of a number; in both situations, the "called party" is the Cell Number's current subscriber, not the person Debt Collector wants to reach.").

³⁰ See, e.g., Chyba v. First Fin. Asset Mgmt., 2013 U.S. Dist. LEXIS 165276, 32-33 (S.D. Cal. Nov. 20, 2013) ("although Plaintiff did not give consent directly to Defendant to call her cell phone number, it is sufficient that Defendant had a good-faith basis to believe that Plaintiff had provided consent to the creditor on whose behalf Defendant sought to collect a debt. Even if Plaintiff is correct in stating that she never gave Defendant or Enterprise consent to call, and there was no actual prior consent from Plaintiff, Defendant is not liable for acting in good faith upon the information provided to it.").

liability. For example, if a business tries to continue the call after being notified that it has dialed the wrong number, the business should not be exempt from TCPA liability.

V. THE COMMISSION SHOULD CLARIFY THAT THE CONSENT REQUIREMENTS FOR AUTODIALED AND/OR PRERECORDED CALLS MADE TO NUMBERS FOR WHICH THE CALLED PARTY IS CHARGED DO NOT APPLY IF THE CALLER HAS NO WAY OF KNOWING WHETHER THE CALLED PARTY WILL BE CHARGED FOR THE CALL

Industry also needs clarification from the commission that 47 U.S.C. § 227(b)(1)(A) and 47 C.F.R. § 64.1200(a)(1)-(2), which prohibit autodialed and/or prerecorded calls without the called party's prior express consent (prior express written consent for telemarketing calls), do not apply to calls made by a person who has no way of knowing that the subscriber will be charged for the call. For example, a district court recently imposed liability on a business for calling a consumer's residential telephone number because the consumer subscribed to a Voice over Internet Protocol (VoIP) service for which he was charged on a per call basis.³¹ There is no way for a business to determine whether the called party uses a VoIP service and/or whether (s)he is charged on a per call basis. If autodialed calls made to such numbers are subject to the TCPA's prior express consent requirements, compliance minded businesses only have two options. They can cease autodialing residential telephone numbers (for both telemarketing and nontelemarketing purposes) if they do not have prior express (written) consent—something that is not required by the TCPA and infeasible for many large businesses—or they can continue to autodial residential telephone numbers and incur unnecessary litigation expenses to defend against lawsuits brought by consumers that suffer little (if any) monetary harm. Neither of these options is palatable, nor does forcing businesses to make such decisions further any public policy. Moreover, given the cottage industry of professional TCPA plaintiffs that exists today,

³¹ See Lynn v. Monarch Recovery Mgmt., 953 F. Supp. 2d 612, 624-625 (D. Md. 2013).

one can reasonably assume that certain "consumers" will obtain telephone service from providers that charge them on a per call basis for the specific purpose of bringing TCPA lawsuits. This scenario cannot be what Congress envisioned when it passed the TCPA nor is it equitable to impose this type of risk on legitimate businesses that have no way of knowing whether the called party will be charged for the call. Clarification by the Commission will provide much needed certainty and will not unduly burden consumers, who can prevent future calls by making a DNC request and/or informing the caller that (s)he is charged for each incoming call.

VI. THE COMMISSION SHOULD PROVIDE THE REQUESTED RELIEF VIA A DECLARATORY RULING

The Commission has the authority to "issue a declaratory ruling terminating a controversy or removing uncertainty." By providing the requested clarifications related to the definition of ATDS, the Commission can terminate the existing uncertainty related to this definition, which is currently being exploited by opportunistic plaintiffs' counsel. Similarly, the Commission can provide the clarifications related to wrong number calls via a declaratory ruling. As explained by United Healthcare, the Commission has a number of alternative methods to provide clarification that will insulate businesses from liability for wrong number calls. For example, the Commission can:

- 1) hold that the terms "called party," as used in 47 C.F.R. § 64.1200(a), and "person," as used in 47 C.F.R. § 64.1200(f)(14), encompass both the subscriber that consented to receive calls and/or with whom the seller has an established business relationship and the subscriber that actually received the call until the caller learns that the number has been reassigned to a new subscriber or is incorrect; and/or
- 2) confirm that a good faith exception from TCPA liability exists for calls that would be exempt from the TCPA but for the fact that: (a) the telephone number was reassigned to a new subscriber without the caller's knowledge; (b) an incorrect telephone number was provided by the customer; and/or (c) an incorrect telephone number was inadvertently recorded by the business.

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³² 47 C.F.R. 1.2(a).

³³ United Healthcare Petition at 10-11.

Additionally, the Commission can confirm that the consent requirements for autodialed and/or prerecorded calls made to numbers for which the called party is charged do not apply to calls made by a person who has no way of knowing whether the called party will be charged for the call.

None of the requested clarifications require the Commission to change its existing rules. Moreover, the clarifications are consistent with the statutory language and prior Commission rulings; therefore, they do not necessitate a separate notice and comment rulemaking, which would unnecessarily delay the relief sought by ACA, United Health, PACE and several other interested parties who have filed petitions and/or comments requesting clarification on these issues. For reasons similar to those outlined in the DIRECTV Comment, PACE contends that the Commission has broad discretion to decide whether to proceed by adjudicating these issues through a declaratory ruling or via a rulemaking.³⁴ The Commission should expeditiously provide the requested clarifications via a declaratory ruling because such relief is desperately needed by businesses, including PACE members, which continue to incur unnecessary expenses in connection with nuisance lawsuits that could be avoided if the Commission provides clarification on these issues.

VII. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling to: (1) clarify that to be considered an ATDS, a predictive dialer must have the "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers;" (2) clarify that the term "capacity," as used in the definition of ATDS, refers to a system's *present* ability (i.e. what it is capable of doing, without further modification, *at the time*

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³⁴ See DIRECTV Comment at 2-5.

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the call is placed); (3) clarify that TCPA liability does not attach to "wrong number" calls made in good faith (including calls to reassigned numbers, calls to incorrect numbers provided by consumers and calls to numbers incorrectly recorded by employees, provided that all such calls are made without the knowledge that the called party is not the intended recipient); and (4) clarify that the consent requirements for autodialed and/or prerecorded calls made to numbers for which the called party is charged do not apply to calls made by a person who has no way of knowing whether the called party will be charged for the call.

Respectfully submitted,

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